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No. 09-1271

In the Supreme Court of the United States

RONALD E. BYERS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a) is not published in the *Federal Reporter*, but is reprinted in 351 Fed. Appx. 161. The opinion of the Tax Court (Pet. App. 4a-19a) is available at T.C. Memo. 2007-331.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2009. A petition for rehearing was denied on January 21, 2010 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 17, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Tax Court held in this case that petitioner, a delivery truck driver, is an independent contractor rather than an employee. The effect of that determina-

tion was to render petitioner liable for self-employment taxes under 26 U.S.C. 1401. The court of appeals affirmed. Pet. App. 3a.

1. In 1999, petitioner signed a Contractor Operating Agreement with Edina Couriers, Inc., pursuant to which he was to provide delivery services. Pet. App. 5a, 7a. The agreement stated that petitioner was "an independent contractor," and that petitioner "or any drivers furnished pursuant to the terms [of the agreement] will not be employees" of Edina. *Id.* at 7a. The agreement further stated that petitioner was "responsible for * * * withholding or any taxes, social security payments or other similar salary deductions." *Id.* at 7a-8a.

Petitioner was not paid a salary, and he did not accrue sick leave, vacation, health benefits, or a pension. Pet. App. 6a. Petitioner instead contracted to receive 70% of what was paid to Edina for his delivery services. *Id.* at 5a. Edina did not report these earnings on a Form W-2, the standard income reporting form for employees, nor did it withhold employment taxes from its payments to petitioner. *Id.* at 8a-9a. Edina instead reported petitioner's earnings on Form 1099-MISC, the form typically used for independent contractors. *Id.* at 9a.

Each of Edina's drivers was responsible for acquiring a truck to provide deliveries, as well as for the maintenance, gas, and insurance of that truck. Pet. App. 6a-7a. A driver who elected to work on a particular day reported his availability to Edina's dispatch center. *Id.* at 5a. Drivers typically selected their own routes and the order in which pickups and deliveries would be made. *Id.* at 5a-6a. Drivers also remained free to make deliveries for other companies. *Id.* at 6a.

Some Edina drivers owned their own trucks, while others leased them. Pet. App. 6a. Petitioner did the

latter, leasing a truck from Conrad Companies, Inc., a company associated with Edina. *Ibid.* Under the lease, Conrad provided equipment, fuel, insurance, and maintenance costs for the leased truck. *Id.* at 7a. In exchange, petitioner made monthly lease payments equal to approximately 55% of the amount he received from Edina. *Ibid.*

2. For the years 1999 to 2002, petitioner did not file federal income tax returns or make estimated federal income tax payments. Pet. App. 9a-10a. Upon an audit, the Commissioner of Internal Revenue determined petitioner's income using records from Edina and petitioner's bank, and the Commissioner found a deficiency in petitioner's tax payments. *Id.* at 10a.

Petitioner challenged the deficiency determination in the United States Tax Court. Pet. App. 4a-5a. Following a trial, the court entered judgment for the Commissioner. See *id.* at 4a-19a. After sustaining the Commissioner's determination of the amounts of petitioner's taxable income for the years 1999 through 2002, *id.* at 11a-12a, the court considered whether petitioner was liable for self-employment taxes for those years. That determination turned on whether petitioner was an independent contractor or an employee of Edina. See *id.* at 13a-14a.*

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* Earnings derived from work as an independent contractor are self-employment income and are therefore subject to the self-employment tax. 26 U.S.C. 1401, 1402(b). For self-employed individuals, the self-employment tax is the counterpart of the FICA taxes imposed on the wages of employees. 26 U.S.C. 3101, 3111; see *Steffens* v. *Commissioner*, 707 F.2d 478, 481 (11th Cir. 1983). An independent contractor is liable for the entire self-employment tax. 26 U.S.C. 1401. An employee, however, is liable for only half of the FICA taxes imposed on his wages (26 U.S.C. 3101); the employer is liable for the other half (26

The Tax Court concluded that petitioner was an independent contractor for the years at issue and was therefore liable for self-employment taxes for each year. Pet. App. 14a-17a. The court identified nine factors that were relevant to its analysis. See *id.* at 14a-15a. It further explained that it would "apply the factors as appropriate under the circumstances" and that "[n]o single factor is dispositive." *Id.* at 15a. After discussing each of the relevant criteria, the court explained that, "[o]f the nine factors, five factors indicate an independent-contractor relationship, three factors indicate an employee relationship, and one factor is neutral." *Id.* at 17a. The Tax Court then stated: "We conclude that petitioner is to be treated as an independent contractor for the years in issue and that petitioner is liable for self-employment taxes for each year." *Ibid.*

3. The court of appeals affirmed the Tax Court's decision "for the reasons stated in the tax court's memorandum." Pet. App. 3a.

ARGUMENT

After identifying and analyzing nine relevant factors, the Tax Court concluded that petitioner was an independent contractor rather than an Edina employee during the relevant tax years. In the course of its discussion, the court observed that five of those nine factors indicated that petitioner was an independent contractor. Petitioner contends that the Tax Court erred by simply counting, rather than weighing, the various criteria relevant to the court's ultimate determination. See, *e.g.*, Pet. 8 (stating that petitioner "was adjudged an 'independent contractor' truck driver merely because a ma-

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U.S.C. 3111). Thus, a worker can incur a lower overall tax liability as an employee than as an independent contractor.

jority of five of nine worker classification factors so indicated").

That argument reflects a misreading of the opinions below. Although the Tax Court observed that five of the nine relevant factors weighed in favor of petitioner's independent-contractor status, it did not declare that fact to be dispositive or otherwise endorse the "tally and point score" (Pet. 14) method that petitioner attributes to the court. The Tax Court's analysis makes clear, moreover, that the most important of those factors *all* supported the conclusion that petitioner was an independent contractor. Further review is not warranted.

1. Earnings derived from work as an independent contractor are self-employment income and are therefore subject to the self-employment tax. 26 U.S.C. 1401, 1402(b). In contrast, wages paid to an employee are subject to FICA taxes imposed on both the employer and the employee, and the employer is required to withhold income taxes from those wages. 26 U.S.C. 3101, 3111, 3402; see note *, *supra* (explaining why treatment of particular earnings as wages may reduce the recipient's overall tax liability).

For tax purposes, the term "employee" means "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 U.S.C. 3121(d)(2). That common-law inquiry requires analysis of several factors, among "the most important" of which is the right to control the manner and means of performance of the work. *United States* v. *W.M. Webb, Inc.*, 397 U.S. 179, 192-193 (1970). See *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323-324 (1992) (construing the term "employee" in ERISA); 26 C.F.R. 31.3401(c)-1(b) (an employment relationship exists

"when the person for whom services are performed has the right to control and direct the individual who performs the services"). Another factor of primary importance is "significant entrepreneurial opportunity for gain or loss." *Corporate Express Delivery Sys.* v. *NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002). Additional factors may be relevant as well, see *Darden*, 503 U.S. at 323-324 (setting forth a non-exhaustive list of other factors), and "all the incidents of the relationship must be assessed and weighed with no one factor being decisive," *id.* at 324 (quoting *NLRB* v. *United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

The Tax Court correctly stated this rule of law, see Pet. App. 15a, and it analyzed the relevant factors before concluding that petitioner was an independent contractor. That conclusion was supported by most of the pertinent factors, including all of the criteria most often identified as crucial. Petitioner had the right to control the work in his relationship with Edina: He scheduled pickups and deliveries without control from Edina, planned his own routes, worked only on the days he wished to work, and retained the right to make deliveries for other companies. *Id.* at 5a-6a, 14a-15a. Petitioner was paid a percentage of gross amounts billed to customers, not a fixed salary, and he was therefore exposed to the possibility of both profit and loss. *Id.* at 15a-16a. He made a significant investment in his tools, and he was required to supply his own truck at his expense. *Id.* at 15a.

Analyzing these facts, the Tax Court correctly concluded that the parties had achieved the relationship that they set out to create in their written agreement, which specifically identified petitioner as an independent contractor. See Pet. App. 7a, 17a. The court recog-

nized that some aspects of the parties' interaction—*i.e.*, petitioner's participation in a service integral to Edina's regular business, his long-term relationship with Edina, and his lack of special skills in addition to truck driving—suggested an employment relationship. See *id.* at 16a-17a. The court correctly held, however, that the totality of the circumstances demonstrated petitioner's status as an independent contractor.

2. Petitioner contends (Pet. 14-16) that the Tax Court simply used a "tally and point score" method in its application of the multi-factor independent-contractor test, and that the Eighth Circuit's decision approving that approach conflicts with *Aymes* v. *Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992), and *FedEx Home Delivery* v. *NLRB*, 563 F.3d 492, 497 n.3 (D.C. Cir. 2009), in which the courts of appeals rejected that method. Petitioner's argument lacks merit. The Tax Court's method was fully consistent with the rule of law stated in *Aymes* and *FedEx*.

As the Tax Court stated in summarizing its analysis of the relevant factors, five of those factors indicated an independent-contractor relationship and three indicated an employee relationship. Pet. App. 17a. But the court did not state that this tally was the sole justification for its judgment. Rather, citing *Aymes*, the Tax Court noted at the outset of its analysis that it would "apply the factors as appropriate under the circumstances." *Id.* at 15a. The court then went on to conduct a factor-by-factor analysis comparable to the analyses performed by the courts of appeals in *Aymes* and *FedEx*.

In *Aymes*, as in this case, the court identified the factors that suggested independent-contractor status, those that suggested employee status, and those that were neutral. 980 F.2d at 861-864. The error that the

Aymes court cautioned against was giving "equal weight" to "indeterminate and thus irrelevant factors," without giving more weight to qualitatively more important factors. But the factors identified by the *Aymes* court as important—such as the contractor's right to control his work and his counterparty's failure to extend "any employment benefits" or to pay any payroll taxes, *id.* at 862—weighed in favor of independent-contractor status here. By contrast, factors that the *Aymes* court considered "negligible in weight"—such as whether the work was done as part of the regular business of the company, and the duration of the parties' relationship, *id.* at 863—were two of the three factors that suggested employee status in this case. *Aymes* therefore is consistent with the decision below both in its broad rule of law and in the particulars of that rule's application.

The court in *FedEx* considered facts similar to those here in determining that single-route delivery drivers were independent contractors rather than employees. 563 F.3d at 498-504. The court explained that the common-law test is "not merely quantitative," and that especially close attention should be paid to "whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'" *Id.* at 497 n. 3 (quoting *Corporate Express*, 292 F.3d at 780). In this case, as in *FedEx*, that factor weighed in favor of independent-contractor status, as the Tax Court noted. See Pet. App. 15a-16a. Far from creating a conflict with *FedEx*, the decision below is consistent with the rule of law that case announced in a very similar factual situation.

Petitioner also contends (Pet. 11-13) that the decision below conflicts with prior Eighth Circuit rulings. Even if such a conflict existed, it would not provide a basis for

this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, petitioner's claim of an intra-circuit conflict, like his claim of a circuit split, rests on the flawed premise that the court of appeals in this case approved the use of a "'tally and point score' method of classifying workers." Pet. 12.

3. Petitioner's reliance (see Pet. 8-11) on this Court's decisions in *Darden* and *United Insurance* is likewise misplaced. In *United Insurance*, the Court stated that, in order to determine whether a worker is an independent contractor or an employee, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 390 U.S. at 258. This Court held that "the total factual context" must be "assessed in light of the pertinent common-law agency principles." *Ibid.* In *Darden*, this Court reiterated that principle. 503 U.S. at 319.

As explained above, the Tax Court correctly stated and analyzed the pertinent common-law agency principles. Petitioner does not contend that the court misidentified the relevant factors, nor does he argue that the court misapplied any particular factor to the circumstances of this case. Rather, he argues that the Tax Court erred by simply counting, rather than weighing in a more holistic manner, the factors suggesting independent-contractor and employee status, respectively. His primary request for relief is that this Court should grant his petition, vacate the decision below, and "remand the case with instructions to apply the *Darden* common law factors." Pet. 8.

Although the Tax Court observed that five of the relevant factors favored independent-contractor status

and three favored employee status, Pet. App. 17a, the court did not state that it was deciding the case based on that numerical comparison alone, and it recognized its responsibility to "apply the factors as appropriate under the circumstances," *id.* at 15a (citing *Aymes*, 980 F.2d at 861). Nothing in *Darden* prohibits a court from announcing the total number of factors supporting each potential disposition of a case. In any event, this Court reviews judgments, not statements in opinions. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Because the most important of the pertinent factors indicated that petitioner was an independent contractor (see pp. 7-8, *supra*), there is no reason to suppose that the courts below would have reached a different outcome if the Tax Court had explicitly "weighed" rather than "counted" the relevant criteria.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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